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Supreme Court of the United States

October Term, 1962

No. 446

JOSEPH CASTELLI, a/k/a GIUSEPPE GAGLIANO,
Petitioner,

against

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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The petition of Giuseppie Gagliano, also known as Joseph Castelli, respectfully shows to this Court and alleges:

Opinion Below

First: The opinion of the Courts below are unreported, but are appended.

Jurisdiction

Second: (a) The judgment or order sought to be reviewed was made and entered July 10, 1962.

(b) No motion for rehearing, nor motion to extend time to petition for certiorari, has been made. It is assumed that the time provisions of 28 U. S. C. Sec. 2101(c) apply, the proceedings below having been in the nature of a writ of error *coram nobis* (Cf. *U. S.* v. *Hayman*, 342 U. S. 205, 273, note 36 (1952); *Mercado* v. *U. S.*, 183 F. 2d 486, 487 (C. A. 1, 1950); *U. S.* v. *Dunbar*, 212 F. 2d 654, 655 (C. A. 2, 1954); *Estep* v. *U. S.*, 251 F. 2d 579, 581 (C. A. 5, 1958).

(c) Jurisdiction of this Court to review by certiorari is conferred by 28 U. S. C. Sec. 1254(1).

Questions Presented

Third: The questions presented for review are these:

(a) Did the District Court violate the fact-finding requirement of Rule 52(a) of the Federal Rules of Civil Procedure, to wit: since petitioner contended that when he pleaded guilty he did not have an attorney and that he had not waived his right to have one, did Rule 52(a) require that the District Court find specially, in denying the motion to vacate the conviction, either that petitioner did have an attorney when he pleaded, or that he did not have one but had nevertheless waived such right?

(b) Was the delay of over four months between the close of testimony and the trial court's decision, when there was no transcript of the testimony and the Court relied entirely on its recollection, reversible error, particularly in view of (1) the failure to find specially whether petitioner had an attorney or did not have counsel but had waived counsel; and (2) errors of recollection made by the Court?

(c) Did the Courts below give excessive weight to the presumption of regularity of the 1927 conviction, and err in placing a "heavy burden" upon petitioner to establish lack of counsel and lack of waiver, particularly in the light of the state of the law in 1927 regarding the right to counsel in non-capital cases? In this connection, did the Courts below fail to grant petitioner the benefit of the presumption that he did not waive his constitutional right to counsel?

(d) Did the Court of Appeals, in adding its own reasons for affirming the District Court, err in drawing adverse inferences from (1) failure of petitioner to produce other witnesses with personal knowledge of what happened in 1927, there being no evidence that any witnesses existed; (2) failure of petitioner to obtain testimony from Judge Knox who accepted the plea of guilty in 1927, Judge Knox

being still on the panel of sitting judges of the Southern District and the government in past *coram nobis* proceedings always having procured and submitted the testimony of Judges or prosecutors as part of its case; and from (3) failure of petitioner on earlier occasions to raise the claim that he pleaded without counsel and without waiver?

(e) Did the decisions below deny substantial justice to the petitioner?

Constitutional Provision, Statutes Involved

Fourth: The relevant provisions are: Constitution of the United States, Amendment VI, Rule 52(a), Federal Rules of Civil Procedure set out verbatim in Appendix.

Statement of the Case

Fifth: Petitioner sought below to vacate a 1927 conviction on a plea of guilty to a narcotics violation, contending that he pleaded without the benefit of counsel and had not waived his right to have counsel. The right to vacate the conviction if his claim were upheld arose under *Johnson* v. *Zerbst*, 304 U. S. 458 (1938); *Walker* v. *Johnston*, 312 U. S. 275 (1941); *U. S.* v. *Morgan*, 346 U. S. 502 (1954).

Testimony was taken on June 27 and June 29, 1961. The hearing was reopened, at petitioner's request, on July 26, 1961, to resolve a dispute as to an exhibit, but no testimony was taken on that date. The decision of the District Court was made November 3, 1961.

Four separate court records were in evidence: not one contained any indication that petitioner had ever had an attorney, notwithstanding in such records there was space provided for the entry of the name of counsel. One of the 1927 court records contained the names and addresses

of counsel in 68 separate cases, but not in petitioner's case.

Petitioner testified that he had no attorney, that he could not afford one at the time and that he would have been glad to have one. He testified that he was not offered counsel by the court, but because of his testimony as to his limited ability to speak and understand English, it was implicit that he might not have understood if such an offer had been made. Petitioner was born in Italy in 1903, first entered the United States in 1921, and was continuously here until his deportation in 1955. The deportation was based upon the 1927 conviction, made applicable to him under retroactivity provisions of the Immigration and Nationality Act of 1952. He reentered this country without inspection in 1958. He stated that he could not speak, read or write English when he came in 1921; nor could he then read or write Italian, having spent a total of only about 2 years in school in Sicily. Until his arrest in January, 1927, he lived in Italian areas and worked as a longshoreman with other Italian immigrants; by 1927 he was able to speak only a "little bit" of English. He testified that he knew when he pleaded guilty he might be sent to jail and did so in the hope that he could thereby avoid being deported.

The government produced a Court Clerk, Mr. Jonas A. Johnson, who testified that in 1927 he had spent only about ten per cent of his time in Criminal Part, and it was his recollection that the judges then always asked an unrepresented defendant if he wished to have counsel assigned. He conceded on cross-examination that the judges did not question defendants in those days the way they do now, about having assigned counsel. He denied ever having told Assistant U. S. Attorney Maran that it was not the custom in 1932 for the court to interrogate defendants whether they wished counsel assigned, except in very serious cases. Mr. Johnson became the Criminal Clerk in 1932.

Petitioner introduced as a witness one Leonard Maran, Esq., presently counsel to the Waterfront Commission in New York. When he was an Assistant United States Attorney, Mr. Maran had, in a *coram nobis* case in 1953 (*U. S.* v. *DiMartini*, 118 F. S. 601) made an affidavit to the Court that he had learned from the Criminal Clerk that it was not the custom in 1932 for judges to ask defendants if they wanted to have counsel assigned, except in very serious cases. He testified that the information put in his 1953 affidavit came, to the best of his recollection, from Mr. Jonas A. Johnson, then Criminal Clerk.

Mr. Johnson testified on cross-examination that narcotics cases in 1927 were not treated as seriously as now; the District Court commented that judges in 1927 could suspend sentences in narcotics cases.

Mr. Johnson also testified that the criminal calendar in 1927 had as many as 300 to 400 cases, of which about 90 per cent were Prohibition cases; that the Prohibition cases were called after the others; that there were so many Prohibition cases in the old courthouse that defendants would be lined up against the walls and in the halls; that unrepresented defendants in such cases were not asked if they wanted counsel; that there would be "bargain days" on which defendants were offered a set fine if they wished to plead guilty. Mr. Johnson assented to the Judge's comment that some of the persons who pleaded guilty were not even the defendants themselves.

A New York City police officer produced three fingerprint charts from the files of the Bureau of Criminal Identification; two contained on the front signatures reading "Giuseppe Gagliano"; one read "Joseph Castelli"; in a handwriting different from the others; on the back was data as to place of birth and occupation similar to that relating to defendant. The District Court's opinion said that such signatures on two of the three cards, and

the data as to place of birth and occupation, "proved" that petitioner was "obviously lying" when he testified that in 1927 he could not write or understand English.

The decision denied relief. Although the Court expressed disbelief in petitioner's testimony, at no point did the opinion find that petitioner had had an attorney; neither did it find that in the absence of an attorney there had been a waiver of counsel; nor was there a finding of any ultimate fact from which either conclusion necessarily flowed.

Jurisdiction of the District Court

Sixth: Jurisdiction lay in Rule 60(b) of the Federal Rules of Civil Procedure, as applied in *U. S.* v. *Morgan*, 346 U. S. 502 (1954).

Reasons for Allowing the Writ

Seventh: (a) To interpret Rule 52(a) of the Federal Rules of Civil Procedure. This Rule provides that facts shall be found specially; and the findings of fact shall not be set aside unless clearly erroneous, due regard to be had to the trial court's opportunity to judge the credibility of witnesses. The purposes of requiring facts to be found specially is not only to aid in appellate review, but also to assist the trial court to its conclusions, since an impression one way may be found to yield to another when the court is required to formulate on paper findings of ultimate facts. *Cf. U. S.* v. *Forness*, 125 F. 2d 928, 942 (C. A. 2, 1942). This Court has had occasion to rebuke inadequate fact findings in *The E. A. Packer*, 140 U. S. 360, 365 (1891); *Commissioner* v. *Duberstein*, 363 U. S. 278 (1960); *Darlington* v. *Turner*, 202 U. S. 195 (1906).

This Court has not said whether Rule 52(a) is applicable to the type of hearing in the instant case, which might explain why it was not applied below. In view of the im-

portance of the question in motions *coram nobis*, in *habeas corpus*, and under 28 U. S. C. Sec. 2255, it is urged that this Court ought to pass upon the question (*Cf. Rushing* v. *Wilkinson*, 272 F. 2d 633, 638 note 3 (C. A. 5, 1959)).

From the decisions below, it cannot be learned whether the Court believed that petitioner had counsel (private or court-appointed), or had no counsel at all but had been offered one which he knowingly declined to accept. The evidence which might sustain one finding might not sustain the other. To fail to make the requisite findings was to violate the letter and spirit of Rule 52(a). A practice followed by so experienced a trial judge and countenanced by so able an appellate bench, signifies a casual treatment of Rule 52(a) which cannot be supposed to be limited to this Circuit. Review by this Court is warranted to safeguard the administration of justice in all the federal courts.

(b) To check the potential danger to justice in substantial time-lag between close of a trial and rendering a decision on factual issues, where the trial court does not have the trial minutes: The decision of November 3, 1961, based entirely on the trial judge's evaluation of the testimony and evidence as recollected by him, was made more than a third of a year after the last testimony. The New York practice of requiring a decision within 60 days after trial by the Court (Sec. 442, N. Y. Civil Practice Act) suggests that delay in decision is considered a problem; and Judge Frank's comment that decisions ought to be made promptly and while the facts are still fresh in the Court's mind (*U. S.* v. *Forness*, 1942, 125 F. 2d 928, 942), is a salutary standard for all district courts. At the least, such long delay, to avoid being considered prejudicial, ought to be offset by precise and accurate findings of fact.

The Court of Appeals said that petitioner's claims of errors of recollection by the trial court are really disagreements with Judge Murphy's conclusions, with one exception which the Court said was "unimportant." The con-

ceded error was not "unimportant" in a case such as this, for the aphorism that hard cases make bad law applies not only to cases with sympathetic appeal, but to unsympathetic ones also. In a case like this, credibility may turn on a matter as thin as a hair; and for the effective administration of justice, long unexplained delays in decisions after trial on issues of fact should be discouraged by reversal. The balance of the claimed errors are more than "disagreements" with the Court's conclusions.

(c) To set down a guide to the weight to be given to the presumption of the regularity of convictions which took place prior to the 1938 case of *Johnson* v. *Zerbst* (304 U. S. 458): The District Court found that petitioner had not borne the "heavy burden" of overcoming the "presumption of regularity" of the 1927 conviction. The Court of Appeals decision implicitly sustained those standards. It is submitted that in this case the presumption ought not to have been so strong as to make petitioner's burden so "heavy". The Court of Appeals for the District of Columbia (*Farnsworth* v. *U. S.*, 1956, 232 F. 2d 59), expressed the proper way to deal with the conflicting presumptions of the regularity of the judgment and that against waiver of right, and said (at p. 64):

> "While, therefore, the burden is upon appellant to establish he did not waive the right, his burden is lightened by the indulgence of every reasonable presumption against waiver."

As pointed out in *Farnsworth* v. *U. S.*, at 63, note 6 (quoting from a law review article by Judge Holtzoff), it was not until the 1938 decision of this Court in *Johnson* v. *Zerbst*, that the bench and bar realized that an unrepresented defendant was *required* to be assigned counsel even in non-capital cases; and not until *Walker* v. *Johnston*, 312 U. S. 275 (1941) was such requirement held applicable to pleas of guilty. Indeed, the Fifth Circuit in 1937 had said, in *Johnson* v. *Zerbst* (92 F. 2d 748, 751), that assign-

ment of counsel was *not* necessary in non-capital cases, and that it knew of no case holding it was. When this Court reversed in 304 U. S. 458, it cited no case in support of reversal, and only five Justices joined in the opinion.

Yet the trial judge here wrote of the presumption of regularity of the 1927 judgment as if the entire 1927 bench in the Southern District must be assumed to have had premonitory powers or to have been far in advance of the benches in other parts of the country. That the trial courts lagged in applying these concepts appears from the fact that in 1948 this Court reversed on a waiver issue (*Von Moltke v. Gillies*, 332 U. S. 708); and different panels of the Second Circuit have held defective the procedures followed by the trial courts in accepting pleas of guilty long after *Johnson* v. *Zerbst*, including a plea taken in 1954 (*U. S.* v. *Lester*, 1957, 247 F. 2d 496, 499-500).

Since the presence or effective waiver of counsel goes to the very jurisdiction of the court to convict (*Johnson* v. *Zerbst, supra*), to presume regularity of a judgment is to presume that everything which by today's standards is required for its validty, was done when the judgment was entered. It is manifestly unrealistic for a court today to presume that the District Judges of the Southern District in 1927 anticipated and followed the constitutional interpretation that was not enunciated until years later. We know that the Fifth Circuit did not do so even in 1937. *Farnsworth* v. *U. S., supra*, expressed the moderate view of reconciling the social interest in stability of judgments with the social interest in setting aside judgments where there was no attorney and no waiver. The Second Circuit has acted at variance with these views. Since these cases continue to arise throughout the country, it is believed that this Court should clarify the weight of the presumption to be accorded a pre-1938 conviction.

(d) To guide the lower courts on matters of evidence:

(1) The Court of Appeals referred unfavorably to petitioner's failure to substantiate his claim by other witnesses. Yet there is nothing to show that petitioner had access to other witnesses. An unwarranted cloud was thus cast on his claim.

(2) The Court of Appeals held it against petitioner that he didn't call Judge Knox as a witness. Judge Knox was still sitting although retired. He was certainly not under Petitioner's "control" and was no more available to Petitioner than to the Government. Under no rule of evidence could there be an adverse inference from petitioner's failure to call him (*Fisch, New York Evidence, Sec.* 1126). In past cases in this District the government had procured the testimony of federal judges (cf. *U. S.* v. *Di Martini*, 1954, 120 F. S. 907; *U. S.* v. *Russell*, 1955, 146 F. S. 102), and with the greater accessibility of a sitting judge to the U. S. Attorney, the government's failure to call Judge Knox permits an inference that his testimony would not have aided the government.

(3) Both courts below referred to petitioner's failure to claim lack of counsel earlier in such manner as to indicate that adverse inferences were drawn therefrom. Thus these courts inferred bad faith from an inference (not based on any evidence whatever) of earlier knowledge by petitioner of his rights. In this type of case, this was prejudicial error. The courts below ignored that (a) his immigration attorney at the 1953 hearing might simply never have heard of *Johnson* v. *Zerbst* and *Walker* v. *Johnston* (cf. *In re Reid*, 198 F. S. 689, 695 (W. D. Va., 1961); (b) if he had, he might have thought the claim useless under the doctrine of implied waiver expressed in *U. S.* v. *Dunbar*, 55 F. S. 678 (E. D. N. Y., 1944) and not disapproved when the same case was before the Second Circuit in 1954 (212 F. 2d 654); and (c) even if his immigration attorney had been acquainted with that branch of

law, he had no reason to believe that any relief was available, since not until the 1954 decision in *U. S.* v. *Morgan*, 346 U. S. 502 did the bar know that relief was available to one not imprisoned.

It is always a potential source of error to judge events and law of the past in terms of concepts prevailing today; and only by such error could the courts below have drawn these inferences.

(e) To do substantial justice:

(1) Four types of court records in this case contain specific space in which to note the name of defense counsel, and no counsel was listed for this defendant. In one record book, names and addresses of counsel were listed for 68 cases, but not for this defendant. Without evidence to support its position, the trial court found the omission might be due to "lack of assiduity" of the court clerk.

(2) The trial court's opinion holds that a man's ability to sign his name, and state his place of birth and occupation, proves he "obviously was lying" when he said he couldn't write and understand English, as if such acts prove these abilities. Signing one's name doesn't prove one can write English; and being able to state one's place of birth and occupation doesn't prove one can "understand" English in the ordinary meaning of the word. Indeed, petitioner did testify that he *could* speak a "little bit" English, and that he could sign his name if he took it easy and took the time. The trial court simply did not remember the testimony accurately, and its own error in recollection caused it to call petitioner a liar in this respect. Surely this erroneous conclusion contributed to the final overall disbelief in petitioner's testimony.

(3) The trial court's opinion said that docket entries reveal things which negative petitioner's "picture of an illiterate foreigner confused by the mysterious workings of

the judicial process". In fact, the defendant had affirmatively testified to the same things which the court thought were "revealed" by the docket, and the court's failure to recall his testimony caused it to believe that petitioner was not candid. Further, petitioner and counsel expressly stated at trial that there was no claim that petitioner did not know what he was doing in pleading guilty, but only that he had done it without the assistance of counsel and was not assigned or offered one. The "picture" was only in the court's mind and not in the record.

(4) The trial court remembered petitioner's 1944 conviction as having been for a narcotics violation, which was not the fact. This was presumably the error recognized by the Court of Appeals but which it classed as "unimportant." But petitioner had testified he was innocent of the 1927 charge; he had previously a 1924 narcotics conviction after trial without an attorney. If the trial court thought that he pleaded guilty in 1944 to a narcotics conviction, this would have made a third narcotics conviction, tend to show that petitioner was a recidivist, cast doubt on his present claim of innocence in 1927 and thus cast doubt on his present credibility. In this type of case, there was no margin for "harmless error" when it could bear upon credibility.

(5) The trial court seemed, although without saying so, to place great weight on testimony by Mr. Johnston as to 1927 practices in the Southern District. Apart from the incongruity of establishing the existence of a regular practice in Criminal Part in 1927 by the testimony of a relief clerk who spent only about ten per cent of his time there, the Courts below utterly failed to come to grips with the conflict between this clerk's present testimony and a statement he gave to Assistant U. S. Attorney Leonard Maran in 1953 which was used and referred to by the court in *U. S.* v. *Di Martini*, 118 F. S. 601. In 1953, Mr. Johnston told Mr. Maran, who repeated it to the court, that

it was *not* customary in 1932, except in very serious cases, for the court to interrogate unrepresented defendants whether they wished counsel assigned. Mr. Johnston testified at the hearing on the same case in 1954 (120 F. S. 907) and did not repudiate this statement. Yet at the 1961 hearing below, Mr. Johnston denied making the 1953 statement. The error of relying on the present self-contradictory testimony of Mr. Johnston to show a practice of offering the assignment of counsel in 1927 would perhaps have come to the trial court's attention if it had attempted to make appropriate findings of fact. The apparent weight given below to the testimony of Mr. Johnston was error prejudicial to a proper result.

Respectfully submitted,

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APPENDIX

Rule 52 Federal Rules of Civil Procedure

"Rule 52. Findings by the Court. (a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b). As amended Dec. 27, 1946, effective March 19, 1948."

Constitution of the United States, Amendment VI

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence."

Opinion of Murphy, *D. J.*

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

THE UNITED STATES OF AMERICA,

Plaintiff,

against

JOSEPH CASTELLI (a/k/a GIUSEPPE GAGLIANO),

Defendant.

MURPHY, *D. J.*

This is a motion in the nature of a writ coram nobis (United States v. Morgan, 346 U. S. 502) challenging petitioner's conviction on his plea of guilty in this court on June 29, 1927, before The Honorable John C. Knox.

It is undisputed that petitioner (under the name of Joseph Castelli) and one Frank Cilesti were indicted in this court on January 26, 1927, for the unlawful sale of heroin and each pleaded not guilty on January 31, 1927, before The Honorable Augustus N. Hand; that on April 7, 1927, Cilesti pleaded guilty before Judge Hand and petitioner again pleaded not guilty; that Cilesti was sentenced on May 2, 1927, to two years to be suspended after the service of ten months in prison, and that petitioner pleaded guilty before the Honorable John C. Knox on June 29, 1927, and was sentenced to one year and one day and on the same day was resentenced to one year. So much appears from the court records and nothing more.

It is the petitioner's claim that he pleaded guilty without any understanding of the charge since he spoke only Italian, and that he was without a lawyer and the court never advised him that it would assign a lawyer to him.

A hearing was had at which petitioner testified that he was born in Sicily in 1903, left school when he was ten and came to the United States in 1921 where he worked and was working at the time of his arrest as a longshoreman. It was his testimony that in 1927 he spoke only Italian and could neither write Italian or English.

After his arrest, he said, in January, 1927, he was in jail where someone told him that if he pleaded guilty he would get a light sentence and would not be deported to Italy where he was in fear of Mussolini.

He testified further that at the time of his plea of guilty he did not understand the judge; there was no interpreter present; he had no attorney and the judge did not tell him that he would not assign one to him.

On cross-examination he said that when he was asked whether he was guilty he merely said, "yeah," and nodded his head.

He admitted that he was convicted in the New York Court of Special Sessions in 1924 after trial on a narcotics charge, but said that he had no lawyer there either; that he did not understand those proceedings and could not say if any testimony was given at the trial. He admitted receiving a two-year sentence although he said he did not understand the sentence at the time it was imposed.

He further admitted that when he was again convicted in Louisiana in 1944 on a narcotics charge that he understood at that time that he had a criminal record because of his 1924 and 1927 convictions. Also, when he was accorded a hearing in 1953 preliminary to his deportation in 1955, he never discussed with his lawyer or the Immigration Inquiry Officer the alleged fact that he had no lawyer at the time of his guilty plea in 1927, although that conviction was the only reason for his deportation.

His wife testified in his behalf and said that in 1927 he understand and spoke very little English.

A deputy clerk of this court since 1922 testified that it was the practice in 1927, if a defendant appeared without

an attorney, for the court or the clerk to ask him if he had an attorney and if the answer was "no" the court or the clerk would ask the defendant whether he wished the court to assign one to him. He admitted that he was not regularly assigned to the criminal part of the court but he does recall that the late Mr. Leary, the clerk who was assigned regularly, followed the same procedure. He denied, on cross-examination, that he ever told a former Assistant United States Attorney that there was no such practice in 1932, or that it was seldom that the court or the clerk would ask a defendant if he wished a lawyer except in serious cases. The former Assistant United States Attorney who made such an affidavit stated in substance that it was probably from this clerk that he received that information but he had no independent recollection of it. This clerk also testified that in 1927 there were a great many prohibition cases, probably 90% of the criminal docket, and many defendants pleaded guilty without a lawyer but that these cases were not grouped with the others and the other cases were called separately. He testified further that he had no recollection of ever seeing a defendant plead to an indictment when he was unable to understand the English language.

When petitioner was recalled he was examined as to his inability to write and understand English and in this he was contradicted by two fingerprint cards on which his signature appeared in 1924 and 1927, and on the back of one was information that could be obtained only from him concerning his place of birth and his occupation. Obviously this proved that the petitioner was lying in this regard.

The only record in existence, other than the court docket, is the docket kept by the United States Attorney for Commissioner's Cases on which there is, among other spaces, a space for the name of defendant's attorney or attorneys. We have examined this docket and it really has no evidentiary value on the issue as to whether he was

represented by counsel since many, many defendants are listed without attorneys and, in our opinion, it merely means that the clerk in charge of this was not as assiduous as he might have been, assuming he had a duty to make such entry, and the further assumption that notices of appearances were filed in cases before the Commissioner.

This docket is revealing, nevertheless, because it shows that the petitioner was arrested, arraigned before the Commissioner and admitted to $4,000 bail, all on the same day, to wit, January 2, 1927. The original bail was fixed at $10,000, then reduced to $6,000 and finally to $4,000. It also shows that the surety on the bail bond was Marie Cardone of #19 Kenmare Street, New York City, just a short distance from the address that petitioner gave, viz., 198 Elizabeth Street. These entries indicate that the petitioner had friends or family, or perhaps his own resources, on the day of his arrest, and are some evidence negativing his picture of an illiterate foreigner confused by the mysterious workings of the judicial process. Of course, it is not conclusive but we feel that it has some probative value.

On the whole evidence we are satisfied that the petitioner has not sustained the heavy burden cast upon him and that the presumption of regularity of the judgment must stand. In short, we do not believe the petitioner and we are satisfied that he has misstated the facts before us in an attempt to escape the predicament he now finds himself in, having been apprehended for being in this country illegally and without the permission of the Attorney General, and facing as he does a new deportation proceeding.

Accordingly, his petition is denied and no writ will issue.

This is an order. No settlement is necessary.

THOS. F. MURPHY,
U. S. D. J.

Dated, New York, N. Y., November 3, 1961.

Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 388—September Term, 1961.

(Argued June 15, 1962 Decided July 10, 1962.)

Docket No. 27325

UNITED STATES OF AMERICA,

Appellee,

v.

JOSEPH CASTELLI, a/k/a GIUSEPPE GAGLIANO,

Petitioner-Appellant.

Before:

FRIENDLY, SMITH and MARSHALL,

Circuit Judges.

Appeal from an order of the District Court for the Southern District of New York, Thomas F. Murphy, *Judge*, denying, after hearing, a motion for an order vacating appellant's conviction, in 1927, of a narcotics offense on a plea of guilty. Affirmed.

ELMER FRIED (Fried & Mailman), New York, New York, *for Petitioner-Appellant.*

RICHARD A. GIVENS (Robert M. Morgenthau, United States Attorney for the Southern District of New York, Andrew T. McEvoy, Jr., Assistant United States Attorney), *for Appellee.*

PER CURIAM:

In 1927 appellant was convicted, on a plea of guilty before Judge Knox in the Southern District of New York, for unlawful sale of heroin. He received a one year sentence. In 1955, the 1927 conviction became the basis for appellant's deportation; he then reentered illegally. Now facing a new deportation proceeding, he made an application in the nature of *coram nobis* to vacate the 1927 conviction, *United States* v. *Morgan*, 346 U. S. 502 (1954), primarily on the ground that, although innocent he neither had nor was offered the assistance of counsel.* *Walker* v. *Johnston*, 312 U. S. 275 (1941). Judge Murphy denied the application after a hearing, and Castelli appeals.

For direct proof of his claim in regard to lack of counsel, Castelli relied wholly on his own testimony. He made no effort to obtain testimony from Judge Knox, based on notes the judge might have with respect to the receipt of Castelli's guilty plea or on the judge's recollection of the general practice in 1927 as to interrogating criminal defendants with respect to the assignment of counsel. Neither did Castelli seek to buttress his testimony by calling any other witnesses with personal knowledge of the latter subject. The Government countered, among other things, with Castelli's admission that he had not previously claimed innocence or lack of counsel, even at the time of his prior

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* A claim was also made that his knowledge of English was so limited that he did not understand the proceedings. This was not pressed at the argument before us; in any event the district judge was warranted in rejecting it, as he did.

deportation proceeding, and with testimony of Jonas A. Johnson, a deputy clerk in the Southern District since 1922, that the regular practice in 1927, save in prohibition cases, was for the court to inquire whether an accused appearing without an attorney had counsel or desired the court to assign counsel. Appellant rejoined with an affidavit of a former assistant United States attorney, submitted in a 1953 proceeding, that this was not the practice, information which the former assistant thought came from Johnson, see *United States* v. *DiMartini*, 118 F. Supp. 601, 602 (S. D. N. Y. 1953), but see *id.*, 120 F. Supp. 907, 908 (S. D. N. Y. 1954); Johnson denied making the statement so attributed to him.

Judge Murphy based his denial of the application on his disbelief of Castelli. The latter now alleges various errors in the judge's opinion, which was prepared without benefit of the trial minutes that were ordered for the appeal; with one unimportant exception, the claimed errors are really disagreements with Judge Murphy's conclusions. Castelli's testimony makes it apparent that, to say the least, his recollection of what happened on June 29, 1927 was vague in the extreme, as almost anyone's would be. If the judge chose to disbelieve what little Castelli did recall and to accept Johnson's testimony, that was his prerogative, *Broadcast Music, Inc.* v. *Havana Madrid Restaurant Corp.*, 175 F.2d 77, 80 (2 Cir. 1949); *Mayer* v. *Zim Israel Navigation Co., Ltd.*, 289 F. 2d 562 (2 Cir. 1960), cert. denied, 368 U. S. 889 (1961); *Guzman* v. *Pichirilo*, —— U. S. ——, —— (1962). Whether there are grounds for the exercise of discretionary authority to suspend Castelli's deportation because of this old conviction, 8 U. S. C. § 1254, is not for us to say.

Affirmed.

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 446

JOSEPH CASTELLI, A/K/A GIUSEPPE GAGLIANO,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 20–22, II. 82–84) [1] is reported at 306 F. 2d 640. The opinion of the district court (Pet. 16–19, I. 3–8, R. 20–24) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on July 10, 1962 (II. 85). The petition for a writ

[1] Two volumes of appendices and proceedings in the court of appeals are referred to by Roman numerals. The record certified by the district court to the court of appeals is referred to by the prefix "R.," except the transcript of the hearing which is referred to with the prefix "Tr."

of certiorari was filed on September 20, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court properly found that petitioner had not sustained the burden of showing that a 1927 conviction, under which he had been deported, was invalid.

STATEMENT

On January 31, 1927, the petitioner pleaded not guilty in the District Court for the Southern District of New York to a charge of selling approximately one ounce of heroin (R.A. 1). On June 29, 1927, petitioner withdrew his former plea, entered a plea of guilty and was sentenced by Judge Knox to imprisonment for one year and one day in the penitentiary at Atlanta, Georgia. Later the same day his sentence was reduced to imprisonment for one year at the Westchester County Penitentiary (R.B.).

Petitioner was deported in 1955 on the basis of the 1927 conviction and re-entered illegally in 1958 (R. 10–19).

In June 1961, petitioner filed a motion in the sentencing court[2] supported by an affidavit in which he claimed that his conviction was invalid because he was not represented by counsel and was not informed of his right to counsel. The motion itself alleges that when petitioner was arrested in January of 1927 for

[2] The notice of motion stated: "This motion is made pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, 28 U.S.C. Sec. 1651(a), and *United States* v. *Morgan*, 346 U.S. 502" (R. 10).

selling narcotics, "we were kept at the jail on Centre Street for about three days, and then we were taken to the old Tombs. While we were in the jail at Centre Street, and while we were at the Tombs, we saw no one, had no visitors, were not told we had the right to have a lawyer, and we just waited" (R. 12). The Commissioner's docket (Government Ex. B, II. 81), introduced at the hearing on the motion, shows that petitioner and his co-defendant were arrested, arraigned, bonded (after two reductions) and released on bail, all on the same day. The court docket entries as to counsel are negative, showing neither an attorney for petitioner nor the name of the government attorney in the space provided therefor (R.A.).

Petitioner testified that after he was arrested in 1927 "somebody" told him while he was in jail that if he plead guilty he would receive a light sentence and would not be deported to Italy where he feared Mussolini (Tr. 34–35). He stated he had no lawyer (Tr. 36). When his counsel asked whether any judge had told him that if he wanted a lawyer one would be provided, the petitioner answered, "No, I don't understand nothing" (Tr. 38). He claimed he spoke only Italian at that time, had no interpreter, and understood very few words (Tr. 39–40).[3]

Petitioner testified that he did not remember everything which occurred after he was arrested in 1927—

[3] Petitioner was born in Italy in 1903 and came to the United States in 1921 (Tr. 40–42). In 1924, he was convicted in a New York State court on a narcotic offense and served two years (Tr. 43, 80–83). He also pleaded guilty to a charge in Louisiana in 1944. He said that he had a lawyer then and later received a pardon (Tr. 44–45, 87–88).

"because it's a long time" (Tr. 32), but that the police had asked him questions which he did not understand at the time because he could not understand English (Tr. 33, 165). Various official police records from 1924 and 1927 bearing petitioner's signature and fingerprints were admitted, on the back of which were answers obtained by police interrogation (Tr. 162, 164, 166, 167–171). Petitioner claimed he could not write (Tr. 42, 159). After being shown signatures in 1924 and 1927 of "Joseph Castelli" and "Giuseppe Gagliano" (Tr. 160, 162, 164), petitioner, while not admitting that he had signed his name, explained: "I sign the name if I take it easy. * * * I might sign it. If I take it easy, I sign" (Tr. 164).

When the petitioner was asked whether he had pleaded not guilty in 1927 or stood silent, he responded (Tr. 75):

> I can't remember everything, everything. That's a long time ago. Maybe if I say something I make a mistake; I can't remember anything.

Later, when asked whether he pleaded not guilty on January 31, 1927, he responded (Tr. 85):

> I can't remember everything. Why I got to say, if maybe I made a mistake, I can't remember everything.

Petitioner's wife testified that petitioner did not understand English when they were married in 1929 (Tr. 106–108).

Mr. Jonas A. Johnson, testified for the government that he was a deputy court clerk in 1927 and that, except in prohibition cases, if a defendant appeared

without a lawyer, it was the practice for either the clerk or the court to ask if he wished to have an attorney (Tr. 111–115). Petitioner presented Mr. Leonard Maran, a former Assistant United States Attorney, who stated that he had prepared an affidavit in 1953 based upon a conversation with Johnson (of which he had no present recollection) to the effect that it was not customary for the court in 1932 affirmatively to interrogate defendants with respect to their desire to have counsel appointed, except in very serious cases (Tr. 136–140). Johnson denied telling this to Maran and stated that, so far as he could remember, a defendant was always asked if he wished to have an attorney (Tr. 118–119), although judges did not customarily go into the matter as thoroughly as they do at present (Tr. 150–152). Johnson said he remembered no instance of a plea being accepted when the defendant appeared not to understand the charge (Tr. 154).

On November 3, 1961, the district judge denied petitioner's motion (R. 20–24). The court found that petitioner had not sustained the burden of overcoming the presumption of regularity attaching to the 1927 conviction. The judge said he did not believe the petitioner, and that petitioner had misstated the facts "in an attempt to escape the predicament he now finds himself in, having been apprehended for being in this country illegally and without the permission of the Attorney General, and facing as he does a new deportation proceeding" (R. 24). The court of appeals affirmed *per curiam* (II. 82–84).

ARGUMENT

The judgment of the court of appeals was entered on July 10, 1962. The petition for a writ of certiorari was filed in this Court on September 20, 1962. Since, as this Court held in *United States* v. *Morgan,* 346 U.S. 502, 505, fn. 4, a motion of this character, in the nature of a writ of *coram nobis,* is a step in the criminal case, the petition is out of time under Rule 22–2 of the Rules of this Court. Petitioner's notice of motion shows that he was aware of the *Morgan* decision and he is therefore properly held to the procedural consequences which flow from that decision.

In any event, the petition presents no question warranting review by this Court. As the Court said in *Morgan,* "It is presumed the proceedings were correct and the burden rests on the accused to show otherwise." 346 U.S. at 512. The district court properly found that petitioner had not sustained his burden.

As noted in the Statement, on the question of counsel, the court docket entry is neutral since, while it does not show that petitioner had an attorney, it is also blank in the space for the government attorney's name. In support of his very belated claim that he did not knowingly enter a plea of guilty, petitioner offered his own testimony. The trial judge could properly find it insufficient to upset a 1927 judgment which petitioner did not undertake to attack until after he had been deported and had re-entered the country illegally. The documentary record negated the allegations in his original affidavit that he had

been held incommunicado for several days.[4] The fact that petitioner was arrested, had bail reduced, and was ultimately released in one day, suggests that he had the assistance of counsel. The later change in the place of his confinement from the federal penitentiary to the Westchester County penitentiary confirms this impression. These circumstances, together with the record of petitioner's signature and his evasiveness in response to inquiries,[5] support the conclusion of the trial judge that petitioner was not a credible witness.

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[4] His subsequent testimony on this was not as explicit as his original allegations in the affidavit.

[5] Petitioner's reticence to answer questions except from his own counsel is exemplified by the examination as to his signature on the 1961 affidavit which formed the basis for the hearing (Tr. 64–65):

Q. Did you sign the affidavit?

A. I don't know if I sign it.

* * * * *

Q. Did you sign this paper?

A. I don't remember if I signed. I don't remember, I can't tell you, if I ever signed the paper.

* * * * *

And on questioning by the Court (Tr. 66):

The WITNESS: This is my name.

The COURT: Is it your signature? Did you sign that?

The WITNESS: I don't know.

The COURT. Out loud—I can't hear you.

The WITNESS: If it is on I must have signed.

The COURT: Don't you recognize your own signature?

The WITNESS: Yes.

The COURT: It is or it is not?

The WITNESS: It looks like my signature.

The COURT: The question is, is it your signature.

The WITNESS: I'm not sure if it is mine.

Petitioner's contention that the trial judge failed to specifically find the facts as required by Rule 52(a), F.R. Civil P. is without merit. The opinion of the trial judge embodies the finding of fact which is crucial to the disposition of this case, that petitioner had not offered probative evidence to overcome the presumption of regularity attacking to the 1927 judgment. In any event, the civil rules do not apply to this criminal proceeding. See *United States* v. *Morgan, supra,* 346 U.S. at 505, fn. 4.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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Supreme Court of the United States

October Term, 1962

No. 446

JOSEPH CASTELLI, a k a GIUSEPPE GAGLIANO,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF

(ON PETITION FOR A WRIT OF CERTIORARI)

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Supreme Court of the United States

October Term, 1962

No. 446

JOSEPH CASTELLI, a/k/a GIUSEPPE GAGLIANO,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF

The Government's Memorandum in Opposition contains statements which are confusing if not misleading. While petitioner may not complain of the casual treatment of some issues and ignoring of others he may properly complain of presentations which are not justified by the record.

1. The government states that the Court docket was "neutral," being blank not only in the space for defendant's attorney, but for the government's attorney as well (G.M. 3, 6);[1] it also says (G.M. 7) that the fact that petitioner was arrested, had bail refused and was ultimately released in one day, suggests he had the assistance of counsel. These statements disregard the docket page which is contained on page 12a in the Government's Appendix in the Court of Appeals: as clear as can possibly be, is the name of the Assistant U. S. Attorney in charge of this case, Isaac Gutman. And no name is listed in the space provided for the name of counsel for the defendant. Further on the same page, it appears that all these things did not happen in one

[1] "G.M." refers to Government's Memorandum in Opposition.

day, but that in truth the defendant was arrested on the 3rd day of January, and released on the 4th. Further, the Government's Memorandum to this Court utterly ignores Government's Exhibit G (which is also Petitioner's Exhibit 1) contained on page 66 of the Petitioner's Appendix in the Court of Appeals, listing the names and addresses of attorneys for defendants in 68 cases, but not for this defendant's case. (Reference to this was made in the Petition to this Court, p. 11.)

2. The government's Memorandum misleads this Court by implying that the petitioner's testimony, that he could sign his name if he "took it easy", was first given following his being shown signatures on fingerprint charts (G.M. 4). In truth, *before he was shown anything*, he was asked (Tr. 159)[2]:

> "Q. If you had to sign something would you use an X?. A. I don't remember.
> Q. I can't hear you. A. *Sometime if I can make it I sign.* If I can't make it, I put an X. I don't remember very well." (italics added)

This question was put to petitioner in 1961, on a surprise re-call by the government (Tr. 158); there had been no previous discussion of signature. Notwithstanding, and with no fingerprint chart exhibited or offered, he did testify, about his 1927 ability, that "if I can make it, I sign" which later testimony translated to mean that he could sign if he "take time" (Tr. 161, 162) or "take it easy" (Tr. 163, 164). Further, the chart first shown him, containing the signature "JOSEPH CASTELLI" (Govt. Ex. C) was clearly not the signature of petitioner, as was called to the District

[2] "Tr." refers to transcript of the hearing in the district court; page references follow the procedure of the government's memorandum, to wit, the numbers at the bottom of each page, which are actually renumbered to make them record pages. The original numbers at the top of the transcript pages are ignored.

Court's attention (Tr. 167) and as that Court apparently recognized by its referring to only *two* cards although *three* were put in evidence by the government (Pet. 5, 18).[3]

3. The opinion of Judge Murphy, referring to the Exhibit set out on page 12a of the Government's Appendix in the Court of Appeals, says:

> "This docket is revealing * * *. These entries indicate that the petitioner had friends or family, or perhaps his own resources, on the day of his arrest, and are some evidence negativing his picture of an illiterate foreigner confused by the mysterious workings of the judicial process. Of course, it is not conclusive but we feel that it has some probative value." (Pet. 19)

The Court had completely forgotten that the petitioner himself had *testified* that he had a father in the United States at the time of his arrest (Tr. 52, 53) and that his father had arranged bail for him (Tr. 56, 185, 186). Further, and more important, the petitioner never claimed, as the District Court thought he did, that he was "confused by the mysterious workings of the judicial process." On the contrary, when the Judge expressed a similar misunderstanding at the hearing, the following ensued (Tr. 90):

> "Mr. Fried: * * * The defendant never said he didn't know what he was doing, your Honor. He has merely mentioned—he has merely said that he was not represented by counsel in 1927.
>
> The Court: He has said much more than that."

Then the Court said to the witness (Tr. 91):

> "The Court: I mean, are we agreed that in 1927 you knew what you were doing when you pleaded guilty?
>
> The Witness: I understand I pleaded guilt; somebody told me all the time guilty means I go to jail.

---

[3] "Pet." refers to the Petition for Certiorari.

> The Court: And you knew by pleading guilty you could be sent to jail?
>
> The Witness: Yes."

The District Court's error in this respect was apparently so clear that the government's Memorandum, in arguing to support the finding of untruthfulness, does not attempt to justify this error.

4. The government's Memorandum utterly ignores the significance of the flat discrepancy between the affidavit made by Leonard Maran, Esq. in 1953 based upon a conversation with Mr. Johnson, and the present denial by Mr. Johnson that he had ever said such a thing to Mr. Maran (G.M. 5). Mr. Maran's affidavit said (Tr. 140):

> "It is deponent's understanding from the present clerk of the criminal part of this court that it was not customary in 1953 for the court to affirmatively interrogate the defendant upon his arraignment with respect to whether he wished counsel appointed or not, except in very serious cases."

Mr. Johnson denied telling this to Mr. Maran (Tr. 119). Mr. Johnson was the "present clerk of the Criminal Part" in 1953. Was Mr. Maran's affidavit in 1953 true or false? Or was Mr. Johnson's present denial true or false? Obviously, they could not both be true; obviously, believing one rather than the other would have a deep effect on the decision; yet the Distlict Court slurred over this discrepancy; and the government's Memorandum makes no attempt to discuss it, much less justify it. Clearly the District Court was influenced by Mr. Johnson's testimony; yet this testimony was required to be discounted if Mr. Maran were truthful. The District Court, certainly made no finding that Mr. Maran was in error; it just apparently put that evidence aside, but without saying so and certainly without any reason for doing so.

5. The government's Memorandum to this Court ignores its own red flag: it quotes Mr. Johnson's testimony that

Judges "did not customarily go into the matter as thoroughly as they do at present" (referring to offer of counsel) (Tr. 150-152). Yet the question as to how deeply the Court went into the question of counsel in accepting a plea from a defendant without an attorney, was the basis of the reversal by this Court on this very issue in *Von Moltke* v. *Gillies*, 332 U. S. 708 (1948). See also *U. S.* v. *Lester*, 247 F. 2d 496 (C. A. 2, 1957). The government's Memorandum ignores these cases, as if it is quite immaterial whether an offer of counsel, if made, was made perfunctorily or was made in the manner required for valid acceptance of waiver of counsel.

6. The government (G.M. 4) refers to police records "bearing petitioner's signature on the back of which were answers obtained by police interrogation." The government's Memorandum refers to the card signed "JOSEPH CASTELLI", as if this is one such card, yet as discussed in "2" above, this card was not signed by petitioner and was apparently ignored by the District Court itself. The information on the back of the fingerprint charts had to do only with *place of birth and occupation* (Pet. 16) and how this could prove that the petitioner "lied" with reference to his ability to write and his ability to understand English, is quite incomprehensible (Pet. 11). Further, contrary to the Judge's recollection, the petitioner did not claim that he couldn't "understand" English in 1927: indeed, he had said he spoke a "little bit" (Tr. 50) and understood a little (Tr. 40). If the cards show that he could tell the police he was born in Italy and was a longshoreman, how does this show he lied when he said he understood and spoke a "little bit" of English. And how does his ability merely to sign his name prove he *lied* about his ability to write English?

7. The government, as did the District Court, treats of Mr. Johnson's testimony without conceding its inherent weakness. Apart from part of his testimony being contradictory to what he said in a case in 1953 (see Point 4 of this

Reply Brief), Mr. Johnson was only a relief man in Criminal Part in 1927. He was in Criminal Part *only about 10% of his time* on duty, being actually regularly attached to other parts (Tr. 148, 95-97). His testimony that it was a regular practice in 1927 to interrogate defendants with respect to whether they wished counsel assigned, in the face of this record, is a pretty thin reed to support the District Court's opinion.

8. The government suggests to this Court that petitioner's affidavit as to his detention on the motion *coram nobis* conflicts with the docket entries of his prompt release on bail (G.M. 3). Fairness should have dictated pointing out that there might have been confusion but no contradiction, for petitioner was taken into custody by New York State authorities soon after his release on bail for violation of parole and detained continuously until his plea of guilty on June 29, 1927 (Tr. 57, 58).

9. The government quotes court clerk Johnson's testimony that he could remember no instance of a plea being accepted when the defendant appeared not to understand the charge (G.M. 5); and then adds, in its "Argument" (G.M. 6):

> "In support of his very belated claim that he did not knowingly enter a plea of guilty, petitioner offered his own testimony."

Now, while there is some excuse for the District Court to have made this mistake (Point 3 above) since the transcript was not before him, there is none for the Solicitor General's office which had the testimony on this score (Tr. 90-91). He knew he was in court in 1927 on a narcotics charge (Tr. 31); he knew he was pleading guilty and that he could go to jail by doing so (Tr. 35); it was made crystal clear that he was *not* contending that he did not know what he was doing, but only that he then had no lawyer and was not offered one (Tr. 90-91).

Further, Mr. Johnson's testimony as referred to, is quite meaningless. Being then in that court only about 10% of his time, he can hardly be witness to an invariable procedure. Nothing said by petitioner as to what happened on the plea of guilty, even as elicited by the Command Performance in the District Court (Tr. 76-78) would have the effect of alarming a court clerk into concern whether that defendant comprehended what was going on.

Further, from Mr. Johnson's testimony as to 1927, there was certainly an awful lot of confusion in the courtroom (Tr. 144-146), with pleas of guilty being taken at least in Prohibition cases from persons who neither had nor were offered counsel (Tr. 145); nay, more, with pleas of guilty taken from *persons who were not even the right defendants* (Tr. 145). That some judges of the Southern District set low fines for those who would plead guilty (Tr. 145-146) did not make the offense trivial, for violations were punishable by imprisonment.

10. The government fails to discuss the argument in the Petition (Pet. 8-9) that the District Court erred in placing a "heavy" burden on petitioner to rebut the presumption of regularity of the 1927 conviction. The Petition pointed out that not until the 1938 decision of this Court in *Johnson* v. *Zerbst* did the bench and bar realize that an unrepresented defendant was *required* to be assigned or at least offered counsel even in a non-capital case; and that therefore it was unrealistic to carry the presumption of regularity of a 1927 judgment to the extreme of placing a "heavy" burden on petitioner to refute it.

The government's chief witness, Mr. Johnson, has admitted that in 90% of the cases in the Southern District in 1927, the Prohibition cases, there was no offer of counsel to defendant who had no attorneys, and yet pleas of guilty were taken from them (Tr. 145-146). Does the government claim that Prohibition-type cases are *not* within the scope of *Johnson* v. *Zerbst*, 304 U. S. 458 (1938)? Of course not!

The Sixth Amendment applies to "*all* criminal prosecutions."

How does the government explain the basis for presuming that the bench of the Southern District were eleven years ahead of the 1938 rule as to 10% of the criminal prosecutions, and yet ignored the rule in 90% of the cases? The only answer can be that in 1927 there was *no* standard practice in the Southern District of assigning or offering counsel in non-capital cases, and a "strong" presumption that there was, flies in the face of the known facts.

11. The government rejects as without merit the Petition's discussion (Pet. 6-7) as to Rule 52(a) of the Federal Rules of Civil Procedure (G.M. 8). Is the government able to figure out from the opinion below whether the District Court thought petitioner did actually have an attorney? Or whether the Court thought he didn't have one but had waived counsel? On what facts was the existence of counsel found—if it was? On what facts was—or could be—waiver of counsel found?

We deal here with basic fairness quite apart from Rule (cf. *The E. A. Packer*, 1891, 140 U. S. 360). Even under the Cri nal Rules (F. R. Cr. P. 23(c)) the facts are required to be found specially if requested. The reasons are set out in many decisions, perhaps most expansively in *U. S.* v. *Forness*, 125 F. 2d 928, 942 (C. A. 2, 1942).

The government asserts that the civil rules do not apply (G.M. 8). The Court of Appeals for the Fifth Circuit thinks otherwise (*Rushing* v. *Wilkinson*, 1959, 272 F. 2d 633, 638, note 3).

12. The government's Memorandum ignores the question whether the proper administration of justice in the lower courts calls for some check to a long time interval (here, over four months) between the close of testimony and the making of a decision based on recollection of such testimony without a transcript on hand (Pet. 7, 2, 3). If

this were a case which the government could appeal had it lost below because of vagueness of the Court's recollection, can it be doubted that the government would be claiming error in this regard? In four months between testimony and decision, is it not inevitable that some of the testimony becomes altered in recollection; and in a close case of conflicting evidence, is not every such possibility a potential source of injustice Does not such possibility enhance the desirability of adequate specific findings of fact (Point 11, above) as well as call for reversal where the slightest doubt exists whether prejudice has resulted? And does not this practice call for the supervisory power of this Court to be used to discourage such a practice?

Respectfully submitted,

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